

GOH CHIN CHUAN

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v.

PP

HIGH COURT MALAYA, PULAU PINANG

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ZAMANI A RAHIM J

[CRIMINAL APPEAL NO: 42-1-01-2013]

10 SEPTEMBER 2013

CRIMINAL PROCEDURE: *Charge - Framing or particulars of - Defective charge - Offence under ss. 13 & 14 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 - Charge under s. 13 - Whether omission to state mode or particulars of exploitation rendered charge defective - Distinguishing feature of charges under ss. 13 and 14 - Whether defect curable under s. 422 Criminal Procedure Code - Charge under s. 14 - Whether omission to incorporate particulars of exploitation in charge fundamentally defective - Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 2*

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The accused was charged in the Sessions Court with two offences under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act'), in particular under s. 13 of the Act ('first charge') and s. 14 of the Act ('second charge'). The trial court found the accused guilty, convicted and sentenced him to nine years' imprisonment from the date of conviction in respect of each charge and the sentences were to run concurrently. Dissatisfied, the accused appealed to this court. Among the issues that arose for determination were (i) whether both the particulars of exploitation as defined in s. 2 of the Act and one or more of the means of exploitation enumerated in s. 13 of the Act were totally absent from the first charge; and (ii) whether the second charge was defective as the prosecution had omitted to state the mode or particulars of exploitation.

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Held (setting aside conviction and sentence of the accused in respect of the first charge; affirming conviction and sentence in respect of the second charge):

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(1) Both ss. 13 and 14 of the Act have a common ingredient of the offence, namely, the expression "for the purpose of exploitation" as defined in s. 2 of the Act. However, s. 13 has a further or additional ingredient of the offence in the form of means or methods to carry out the said exploitation. (para 16)

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- A (2) The “child” is defined in s. 2 to mean “a person who is under the age of eighteen years”. As the age of the trafficked person, who is a child under s. 14 of the Act is a distinguishing feature with the offence of trafficking in persons by means of threat, force, etc, under s. 13 of the Act, the age of the
- B trafficked child is therefore vital. It should be stated in the s. 14 charge which was correctly done in this case. (para 15)
- (3) Both the particulars of exploitation as defined in s. 2 of the Act and one or more of the means of exploitation enumerated
- C in s. 13 itself were totally absent from the first charge. The distinguishing feature of the charges under ss. 13 and 14 is the means or method of exploitation. There are no less than eight means which are listed in s. 13 itself. These double omissions or failures to incorporate the purpose of exploitation
- D and the means of exploitation were fundamentally defective and bad in law as both the purpose and means of exploitation were the essential ingredients of the offence. Since they were omitted from the s. 13 charge, the charge was wholly defective and the defect was not curable under s. 422 of the Criminal
- E Procedure Code. (para 19)
- (4) An omission to incorporate the particulars of exploitation in the charge is not fundamentally defective as the accused was not misled by its omission. Applying the observations to the
- F second charge which was identical to the charge in *Choong Loke Kian & Satu Lagi lwn. PP* and *Siti Rashidah Razali & Yang Lain lwn. PP*, the second charge herein was not defective, though it is advisable or desirable to particularise in the charge the “exploitation” as defined in s. 2 of the Act. (paras 12, 13 & 19)
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Case(s) referred to:

Aw Yang Kee Chuan lwn. PP [1992] 1 CLJ 979; [1992] 1 CLJ (Rep) 398 HC (**refd**)

Basri Md Desa v. PP [2011] 1 CLJ 884 HC (**refd**)

H *Chang Chai Choi v. PP* [2013] 7 CLJ 166 HC (**refd**)

Choong Loke Kian & Satu Lagi lwn. PP [2012] 1 LNS 176 HC (**foll**)

Ng Yu Wah v. PP [2012] 4 CLJ 494 HC (**foll**)

PP v. Mohamad Sabu [2012] 5 CLJ 246 HC (**refd**)

PP v. Mohd Azam Basiron & Anor [2010] 9 CLJ 1 CA (**refd**)

I *Santosh Kumari v. State of Jammu And Kashmir & Ors* [2012] 2 CLJ 1 SC (**refd**)

Siti Rashidah Razali & Yang Lain lwn. PP [2011] 9 CLJ 459 HC (**foll**)

Legislation referred to:

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007,
ss. 2, 13, 14
Criminal Procedure Code, s. 422
Penal Code, s. 186

For the appellant - Zamri Idrus (Mohd Fadzil Hashim with him); M/s Zamri Idrus & Co

For the respondent - Mohd Faisal Mohd Noor; DPP

Reported by Kumitha Abd Majid

JUDGMENT**Zamani A Rahim J:**

[1] The appellant (accused) was charged with two offences under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (hereinafter referred to as “the Act”). The first charge is under s. 13 of the Act which reads as follows:

(1) First charge

Bahawa kamu pada 27 Mac 2011, jam lebih kurang 6.20 petang bertempat di No. 1, Tingkat 5, Blok B, Pangsapuri Perai Utama, Perai, dalam Daerah Seberang Perai Tengah, dalam Negeri Pulau Pinang, telah memperdagangkan seorang perempuan warganegara Vietnam bernama Bui Thi Sau Rieng pemegang passport nombor B 5042791 yang berusia dua puluh sembilan tahun bagi maksud eksploitasi, oleh itu kamu telah melakukan kesalahan di bawah Seksyen 13 Akta Anti Permerdagangan Orang Dan Anti Penyeludupan Migran 2007 dan boleh dihukum di bawah peruntukan yang sama.

[2] The second charge is under s. 14 of the Act and the charge reads as follows.

(2) Second charge

Bahawa kamu pada 27 Mac 2011, jam lebih kurang 6.20 petang bertempat di No. 1, Tingkat 5, Blok B, Pangsapuri Perai Utama, Perai, dalam Daerah Seberang Perai Tengah, dalam Negeri Pulau Pinang, telah memperdagangkan seorang kanak-kanak perempuan bernama Phan Ti Cam Tien yang berusia 17 tahun 5 bulan, pemegang passport nombor B 4455136, berwarganegara China iaitu bagi maksud eksploitasi, oleh itu kamu telah melakukan kesalahan di bawah Seksyen 14 Akta Anti Permerdagangan Orang Dan Anti Penyeludupan Migran 2007 dan boleh dihukum di bawah peruntukan yang sama.

A [3] After a full trial, the Sessions Court Judge found the accused guilty, convicted and sentenced him to nine years imprisonment from the date of conviction (ie, 10 December 2012) in respect of each charge and the sentences were to run concurrently from the date of conviction.

B [4] Hence this appeal.

C [5] When the appeal was heard on 10 September 2013, I affirmed the decision of the learned Sessions Court Judge on conviction and sentence in respect of the second charge under s. 14 of the Act. The accused's conviction and sentence stood - nine years imprisonment from date of conviction ie, 10 December 2012.

D [6] However, the conviction and sentence of the accused in respect of the first charge under s. 13 of the Act was set aside. The accused was acquitted and discharged. He came out clean and a free man in respect of the first charge.

E [7] Aggrieved by my decision to confirm the conviction and sentence on the second charge, the accused took up a further appeal to the Court of Appeal, likewise the prosecution filed an appeal against the accused's acquittal of the first charge.

F [8] The affirmation of the conviction and sentence of the second charge and the setting aside of the same of the first charge are grounded on the framing of charges under the Act. I propose to deal with the second charge first, which is the charge under s. 14 of the Act. It reads as follows:

Offence of trafficking in children

G 14. Any person, who traffics in persons being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.

H [9] Learned counsel argued that the second charge was defective as the prosecution omitted to state the mode or particulars of exploitation. The expression of "exploitation" is defined in s. 2 of the Act to mean all forms of sexual exploitation, forced labour or services, slavery, servitude, any illegal activity or the removal of human organ. I have considered a similar charge

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under s. 14 of the Act in the case of *Choong Loke Kian & Satu Lagi lwn. PP* [2012] 1 LNS 176, Criminal Appeals No: 42-73-2011 and 42-74-2011 where the particulars of exploitation as defined in s. 2 were omitted from the charge and I observed as follows:

Saya berpendapat pertuduhan di bawah ATIP yang dihadapkan ke atas Perayu-Perayu adalah jelas, terang dan mengandungi butiran yang memadai mematuhi kehendak Kanun Prosedur Jenayah. Pertuduhan juga adalah bukan pertuduhan yang rumit. Malah segala keterangan yang dikemukakan, terutamanya oleh mangsa yang memberikan deposisi di bawah seksyen 54 ATIP sebelum bicara penuh telah menerangkan satu-persatu peranan Perayu-Perayu dan bentuk kesalahan/pengaduan yang harus dijawab oleh Perayu-Perayu. Notis yang jelas telah diberikan kepada tertuduh sejak awal lagi. Malah sejak tarikh deposisi lagi Perayu/Tertuduh diwakili peguam yang berpengalaman. Oleh yang demikian ketidaktahuan unsur *actus reus* dan *mens rea* tidaklah sebenarnya menjadi isu. Justeru itu tiada pelanggaran ungkapan “miscarriage of justice”.

Sekiranya terdapat ketinggalan itu, ianya tidak boleh dikatakan material dan telah mengelirukan Perayu-Perayu: sila lihat seksyen 156 Kanun Prosedur Jenayah. Di samping itu ketinggalan dalam merangka pertuduhan, sabitan dan hukuman yang dijatuhkan adalah sah kerana tidak wujud “miscarriage of justice”: sila lihat seksyen 421 Kanun Prosedur Jenayah. Akhirnya mahkamah boleh menggunakan budi-bicara di bawah seksyen 422 Kanun Prosedur Jenayah bagi memulihkan pertuduhan sedemikian.

[10] Having made the above observations, I did not strike down the case of *Choong Loke Kian & Satu Lagi, supra* on the ground of defective charge. The Sessions Court’s conviction and sentence was affirmed and the appellants’ appeal was dismissed.

[11] However, in *Ng Yu Wah v. PP* [2012] 4 CLJ 494 having referred to the cases of *Choong Loke Kian & Satu Lagi, supra* and *Siti Rashidah Razali & Yang Lain lwn. PP* [2011] 9 CLJ 459 in relation to the proper charge under s. 14 of the Act, I have opined as follows:

I am in agreement with Azman Abdullah J in *Siti Rashidah Razali’s case supra* that it is desirable for the prosecution to state the mode or particulars of exploitation to enable the accused person to know the exact charge against him and to make adequate preparation to meet it.

A [12] In the above passage, I deliberately used the word “desirable” to show that in the context of the case of *Choong Loke Kian & Anor*, *supra* and perhaps the case of *Siti Rashidah Razali*, *supra* omission to incorporate the particulars of exploitation in the charge is not fundamentally defective as the accused is not misled by its omission.

B [13] Applying the above observations to the second charge in this case which is identical to the charge in *Choong Loke Kian & Anor*’s case, *supra* and *Siti Rashidah Razali*’s case, *supra*, both under s. 14 of the Act, it is my considered view that the second charge herein is not defective, contrary to the contention of learned counsel.

C [14] Now, I come to the first charge which is under s. 13 of the Act. It provides as follows:

D **Offence of trafficking in persons by means of threat, force, etc**

E 13. Any person, who traffics in persons not being a child, for the purpose of exploitation, by one or more of the following means:

- (a) threat;
- (b) use of force or other forms of coercion;
- F (c) abduction;
- (d) fraud;
- (e) deception;
- G (f) abuse of power;
- (g) abuse of the position of vulnerability of a person to an act of trafficking in persons; or
- H (h) the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person,

I commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.

[15] Unlike the second charge, I have set aside the accused's conviction and sentence in respect of the first charge. My grounds are these. Trafficking in persons by means of threat, use of force or other forms of coercion, abduction, fraud, deception, abuse of power etc, the trafficked person is not a child. The "child" is defined in s. 2 to mean "a person who is under the age of eighteen years". As the age of the trafficked person, who is a "child" under s. 14 of the Act, is a distinguishing feature with the offence of trafficking in persons by means of threat, force etc under s. 13 of the Act, the age of the trafficked child is therefore vital. It should be stated in the s. 14 of the Act charge which is correctly done in this case.

[16] Both ss. 13 and 14 of the Act have a common ingredient of the offence namely, the expression "for the purpose of exploitation" as defined in s. 2 of the Act. However s. 13 of the Act has a further or additional ingredient of the offence in the form of means or methods to carry out the said exploitation.

[17] In the case of *Chang Chai Choi v. PP* [2013] 7 CLJ 166, I am in agreement with learned Judicial Commissioner that the Sessions Court Judge had correctly identified the ingredients of the offence under s. 13 of the Act. They are as follows:

- (i) Activity by way of recruitment, transporting, transfer, harbouring or receipt;
- (ii) Means through the threat of use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and
- (iii) Purpose of all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.

[18] In *Ng Yu Wah's* case, *supra*, reference was made to an Indian case of *Santosh Kumari v. State of Jammu And Kashmir & Ors* [2011] 9 SCC 234 which was reported in [2012] 2 CLJ 1, in discussing the provision relating to the framing of charge as

A contained in the Code of Criminal Procedure 1989 which is applicable to State of Jammu and Kashmir, JM Panchal SCJ *inter alia* said:

B [6] It is well-settled law that in drawing up a charge, all verbiage should be avoided. However, a charge should be precise in its scope and particular in its details. The charge has to contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. One of the requirements of law is that when the nature of the case is such that the particulars mentioned in the charge do not give the accused sufficient notice of the matter with which he is charged, the charge should contain such particulars of the manner in which the alleged offence was committed as would be sufficient for that purpose. If A is accused of the murder of B at a given time and place, the charge need not state the manner in which A murdered B.

E [19] As decided in *Choong Loke Kian & Satu Lagi, supra* and *Siti Rashidah & Yang Lain, supra*, the charge under s. 14 of the Act is not defective, though it is advisable or desirable, to particularise in the charge the “exploitation” as defined in s. 2 of the Act. The same cannot be said in the framing of the charge under s. 13 of the Act. In the instant case, both the particulars of exploitation as defined in s. 2 of the Act and one or more of the means of exploitation enumerated in s. 13 of the Act itself are totally absent from the first charge. The distinguishing feature of the charges under s. 13 and s. 14 of the Act is the means or method of exploitation. There are no less than eight means are listed in s. 13 of the Act itself. These double omissions or failures to incorporate the purpose of “exploitation” and the means of exploitation are fundamentally defective and bad in law as both the purpose and means of exploitation are the essential ingredients of the offence: see *Chang Chai Choi, supra*. As they were omitted from the s. 13 of the Act charge, the charge is wholly defective and the defect is not curable under s. 422 of the Criminal Procedure Code: see *Basri Md Desa v. PP* [2011] 1 CLJ 884.

I [20] The failure to incorporate the essential ingredients of the offence is exemplified in the case of *PP v. Mohamad Sabu* [2012] 5 CLJ 246; [2011] 6 AMR 250 where the appellant was charged with an offence under s. 186 of the Penal Code (‘the PC’) which reads “Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with

imprisonment for a term which may extend to two years or with fine which may extend to ten thousand ringgit or with both". The issue was whether the prosecution had failed to prove the main ingredients of the charge and therefore failed to establish a *prima facie* case against the appellant. In dismissing the appeal by the prosecution, the court held as follows:

(i) There was clearly a failure to incorporate the *mens rea* element that the respondent had voluntarily obstructed the public servant and there was an obvious omission of the expression "in the discharge of his public functions" which form the two essential ingredients of the offence in the charge. The offence under s. 186 of the PC is not a strict liability crime wherein the presumption of *mens rea* is displaced. As there was failure to incorporate the word voluntary in the charge, denoting the *mens rea* or mental element of the offence, the charge was therefore substantially defective as no offence had been disclosed under the said s. 186;

(ii) The second ingredient of the offence under s. 186 of the PC, which reads "such obstruction must be in the discharge of public functions of such public servant", was also not mentioned in the charge. The charge stated that the public servant was conferred with the power to serve (should read "execute") the warrant of arrest issued by the Magistrate. This averment was incorrect or inaccurate and misconceived. Therefore, the second ingredient which was described in the charge was inaccurately and imprecisely stated; and

(iii) Since both the essential ingredients were omitted from the charge, the charge was therefore fundamentally defective and the defect was not curable under s. 422 of the Criminal Procedure Code.

[21] In another case *Aw Yang Kee Chuan lwn. PP* [1992] 1 CLJ 979; [1992] 1 CLJ (Rep) 398 where it was held the element of knowledge or reasonable belief must be stated in the charge as it was an essential ingredient of the offence. Without knowledge or belief, no offence is disclosed or the offence is not complete. In his opening judgment at p. 399, Abdul Aziz Mohammad J said:

Terlebih dahulu saya perlu menegur bahawa pertuduhan pilihan terhadap perayu, iaitu pertuduhan di bawah mana dia disabitkan, tidak menyebut satu unsur penting bagi kesalahan di bawah s. 411

- A** Kanun Keseksaan, iaitu unsur mengetahui atau mempunyai sebab untuk mempercayai barang yang berkenaan itu barang curi. Majistret-majistret hendaklah mengambil berat memastikan sesuatu pertuduhan itu menyebut setiap unsur (ingredient) bagi sesuatu kesalahan oleh kerana, jika mana-mana unsur tidak disebut, pertuduhan itu akan gagal memperlihatkan kesalahan.
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[22] And in the Court of Appeal case of *PP v. Mohd Azam Basiron & Anor* [2010] 9 CLJ 1, one of the grounds of the appeal being dismissed was the defects in the charge. At the end of his judgment, Suriyadi Halim Omar JCA (as he then was) said as follows:

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- D** With too many chinks appearing in the prosecution's case, especially as regards the defects in the charge, the want of credibility of SP7's testimony, and not a shred of independent corroborative evidence found even if he had been found as reliable, accompanied by other flaws in the prosecution's case, there was no hesitation in dismissing the appeal.

- [23]** Based on the aforesaid grounds, I ordered that the accused's conviction and sentence on the first charge under s. 13 of the Act is set aside, whilst the conviction and sentence of the accused in respect of the second charge under s. 14 of the Act is hereby affirmed.
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